2000

Snow Flower Homeowners Association v. Snow Flower, Ltd., Jack W. Davis, Inc. : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SNOW FLOWER HOMEOWNERS ASSOCIATION,	:	
Plaintiff and Appellant,	:	Case No. 20000316-CA
vs.	:	
SNOW FLOWER, LTD., JACK W. DAVIS, INC. a California corporation, and DOES 1 through 100, inclusive,	:	Argument Priority No. 15
Defendants and Appellees.	:	

BRIEF OF APPELLANT

APPEAL FROM JUDGMENTS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SUMMIT COUNTY
STATE OF UTAH
HONORABLE PAT BRIAN
HONORABLE ROBERT K. HILDER

Ronald G. Russell
Brett Swanson
PARR WADDOUPS BROWN
GEE & LOVELESS
185 South State, Suite 1300
P.O. Box 11019
Salt Lake City, UT 84147

Robert F. Babcock (0158)
Brian J. Babcock (6172)
BABCOCK BOSTWICK SCOTT
CRAWLEY & PRICE
57 West South Temple, 8th Floor
Salt Lake City, UT 84101
Attorneys for Appellant Snow Flower

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

SNOW FLOWER HOMEOWNERS ASSOCIATION,	:	
Plaintiff and Appellant,	:	Case No. 20000316-CA
vs.	:	
SNOW FLOWER, LTD., JACK W. DAVIS, INC. a California corporation, and DOES 1 through 100, inclusive,	:	Argument Priority No. 15
Defendants and Appellees.	:	

BRIEF OF APPELLANT

APPEAL FROM JUDGMENTS IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SUMMIT COUNTY
STATE OF UTAH
HONORABLE PAT BRIAN
HONORABLE ROBERT K. HILDER

Ronald G. Russell
Brett Swanson
PARR WADDOUPS BROWN
GEE & LOVELESS
185 South State, Suite 1300
P.O. Box 11019
Salt Lake City, UT 84147

Robert F. Babcock (0158)
Brian J. Babcock (6172)
BABCOCK BOSTWICK SCOTT
CRAWLEY & PRICE
57 West South Temple, 8th Floor
Salt Lake City, UT 84101
Attorneys for Appellant Snow Flower

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UTAH COURT OF APPEALS

SNOW FLOWER HOMEOWNERS ASSOCIATION,	:	
Plaintiff and Appellant,	:	Case No. 20000316-CA
vs.	:	
SNOW FLOWER, LTD., JACK W. DAVIS, INC. a California corporation, and DOES 1 through 100, inclusive,	:	
Defendants and Appellees.	:	

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to the Utah Code Annotated 1953, as amended, §78-2a-3(2)(j).

STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

a. Did the trial court err in granting Defendants motion for summary judgment dismissing the Association's breach of warranty and breach of implied warranty claims in spite of the fact that the Utah Condominium Ownership

Act which governed this project required the condominiums to be built according to the building codes? (R. 211-16)

b. Did the trial court err in granting Davis' motion to dismiss dismissing the Association's tort causes of action where Davis had independent duties apart from those contained in the contract? (R. 116-18)

The issues presented on appeal are to be decided under the "correction of error" standard as set forth in Taylor v. Ogden School District., 927 P.2d 159 (Utah 1996).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISION

There are no constitutional provisions which are determinative as to the issues raised. The Utah Condominium Ownership Act, U.C.A. §57-8-1 et seq. and its interpretation and application the determinative Section 57-8-35(2) is as follows:

> Nothing in this chapter shall be interpreted to state or imply that a condominium project, unit, association or unit owners, or management committee is exempt by this chapter from compliance with the zoning ordinance, building and sanitary codes, and similar development regulations which have been adopted by a municipality or county. No condominium project or any use within said project or any unit or parcel or parcel of land indicated as a separate unit or any structure within said project shall be permitted which is not in compliance with said ordinances and codes. (Emphasis added.)

STATEMENT OF THE CASE

A. Nature of the Case

The dispute between the Association and Davis relates to the construction of a multiple-unit condominium project known as the Snow Flower Condominiums in Park City, Utah, ("Project").

In or about 1978 and 1979, Davis, the original project owner and developer, contracted for the construction of the Project. (F of F #1, R. 215; Affidavit of Davis ¶ 3; R. 158) Davis prepared and filed with the Summit County Recorder on September 25, 1978 Condominium Declaration submitting the Project to the Utah Condominium Ownership Act, U.C.A. §57-8-1 et seq. (See Affidavit of Davis, generally; R. 156-59; Condominium Declaration; R. 165-69; Survey Map; R. 180; See Addendum) These declaration set forth the covenants, conditions and restrictions relating to the Project. Davis further established pursuant to the Utah Condominium Ownership Act the Snow Flower Homeowners Association. The purchasers of the individual units automatically became members of the Association. (F of F #6; R. 215; R. 165-69; See Addendum)

Davis, the original seller, sold the individual units to various purchasers pursuant to earnest money agreements and uniform real estate contracts. (F of F #3; R. 215; Affidavit of Davis, #6; R. 186; See Addendum) Title was ultimately transferred to the units by means of warranty deeds. (F of F #5; R. 215; See Addendum) Each of these

documents referred to the Condominium Declarations and a Map Record of Survey. (F of F #7; R. 214; See Addendum)

In 1996, the Association commenced a project to remodel the units including work on the exterior of the buildings. As part of this process, numerous deficiencies were discovered in the original construction of the buildings. Many of the deficiencies discovered related to construction that did not meet the minimum building codes. (Affidavit of Rhoads, # 7 and 8; R. 163)

The Association notified Davis of the problems. The Association contracted with a new contractor at a significant cost to the Association to rectify the deficiencies and bring the buildings into compliance with the building codes. (Affidavit of Rhoads, #7 and 8; R. 163)

The Association filed a Complaint in the Third Judicial District Court, Summit County, against Davis for damages incurred as a result of the defective units which it sold to the members of the Association. The Complaint claimed damages under various legal theories: strict liability, breach of contract, negligence, breach of implied warranty, and breach of implied warranty of fitness. (R. 001-14)

During the course of the proceedings, Davis filed a Motion to Dismiss. (R. 042-044) After reviewing the pleadings and oral argument, the trial court denied the motion in part, but granted the Motion dismissing the tort claims finding they were barred by the Economic Loss Rule. (R. 116-18) Thereafter, Davis filed a Motion for Summary

Judgment to dismiss the remaining causes of action. (R. 140-42) The Trial Court, after oral argument, granted Davis' Motion and entered a Final Judgment. (R. 211-19)

B. Course of Proceedings and Disposition of the Trial Court

On June 8, 1998, Davis filed a Motion to Dismiss on two theories: (1) a homeowners association cannot sue for construction defects in the absence of contractual privity with Davis and (2) tort claims for purely economic loss are barred by the economic loss rule. (R. 042-44) The trial court on December 1, 1998 denied the motion in part, but granted the Motion dismissing the tort claims finding they were barred by the Economic Loss Rule. (R. 116-18)

Thereafter, Davis filed a Motion for Summary Judgment asserting that there were no warranties, express or implied, given to the Association or its members. (R. 140-42) The trial court, after oral argument, granted Davis' Motion and entered its Order Granting Defendants' Motion For Summary Judgment on March 17, 2000 and entered a Final Judgment on March 17, 2000. (R. 211-19)

This appeal is from the Amended Order on Motion to Dismiss dated December 1, 1998, the Order Granting Defendants' Motion for Summary Judgment dated March 17, 2000, and the Final Judgment dated March 17, 2000.

The Association filed its Notice of Appeal in the Third District Court, Summit County, State of Utah, on April 14, 2000. On May 9, 2000, the Association filed its

Docketing Statement with the Utah Supreme Court. Thereafter, on June 5, 2000, the Utah Supreme Court transferred this matter to the Utah Court of Appeals.

C. Designation of Parties

Snow Flower Homeowners Association was the Plaintiff in the underlying lawsuit and is the Appellant in this appeal and throughout this brief will be referred to as "the Association."

Snow Flower, Ltd. and Jack W. Davis, Inc. were the Defendants in the underlying lawsuit and are the Appellees in this appeal and throughout this brief will be referred to as "Davis."

STATEMENT OF THE FACTS

1. In or about 1978 and 1979, Davis contracted for the construction of the Snow Flower Condominiums. (F of F #1; R. 215; Affidavit of Jack Davis ¶3; R. 158)
2. Davis is the developer and original seller of condominium units constructed in Summit County. (Affidavit of Jack Davis, generally; R. 156-59)
3. The Project was constructed as a condominium development subject to the Utah Condominium Ownership Act, Utah Code Annotated §57-8-1 et seq. (See Affidavit of Jack Davis, generally; R. 156-59; Condominium Declaration; Survey Map; See Addendum)

4. Davis sold individual condominium units to private owners pursuant to earnest money agreements and uniform real estate contracts. (F of F #3; R. 215; Affidavit of Jack Davis, ¶6; R. 186; See Addendum)

5. The earnest money agreements and uniform real estate contracts do not contain specific warranty language relating to construction defects or deficiencies. (F of F #4; R. 215)

6. The earnest money agreements and uniform real estate contracts do specifically refer to the condominium declarations and the record of survey map of the project. (See Addendum.)

7. Davis transferred title to the units to the private owners pursuant to warranty deeds which do not contain specific warranty language relating to construction defects or deficiencies. (F of F #5; R. 215; See Addendum)

8. The warranty deeds by which the condominiums were transferred specifically refer to the condominium declaration and record of survey map of the Project. (F of F #7; R. 214)

9. The Association is a non-profit homeowners association created in Summit County in 1978 by Davis as the original developer. The Association was organized pursuant to the Act. (F of F #6; R. 215; R. 165-69; See Addendum)

10. The private owners became members of the Association. (R. 167; See Addendum)

11. The Association recently contracted for the remodel of certain portions of the Project. During the course of the remodeling project, the Association discovered defects in the original construction. The Association claims that there were violations of the 1976 building code, which code was referenced in the original construction drawings and specification dated March 30, 1978. (F of F #8; R. 214)

12. During the course work at the project, the Association hired an expert to review the project, original drawings and specifications dated March 30, 1978. (Affidavit of Joe A. Rhoads, ¶ 5; R. 163)

13. On sheet "G" of the drawings under the heading "General Notes", note No. 1, it reads: "All construction materials and installation shall comply to the 1976 Uniform Building Code and other Ordinance of Local Governing Authorities." (Affidavit of Joe A. Rhoads, ¶ 6; R. 163)

14. Over the period of time that the expert has been involved with the project, the expert, along with the project architect and general contractor, have observed and noted in detail the significant defects in the construction of the project including violations of the building codes. (Affidavit of Joe A. Rhoads, ¶¶ 7 and 8; R. 163)

SUMMARY OF THE ARGUMENT

This case is one that relates to warranties, express and implied, along with tort theories for the construction of new condominiums. Davis, the project developer/seller

contracted for the construction of a condominium project in Park City, Utah. Davis constructed this project as a condominium development subject to the Utah Condominium Ownership Act which specifically requires that the project be built according to the building codes. Davis ultimately sold the units to individuals pursuant to written agreements and transferred title pursuant to warranty deeds. While these documents did not contain specific warranty language, each specifically referenced the Condominium Declaration and Survey Map which each were recorded against the property. The Condominium Declaration and the Survey Map, however, acknowledge and represent that the project was subject to the Utah Condominium Ownership Act which requires that the project be built in accordance with the applicable building codes. It is undisputed, however, that the project was not built in accordance with the building codes.

The trial court ignored these documents as they relate to the warranties and requirements created by the Utah Condominium Owners Act and ruled that there were no warranties whatsoever relating to the project. This failure to follow these controlling documents and incorporate the requirements of the Utah Condominium Act by the court is correctable error.

Further, while the Association believes it has warranty claims, the Association also has tort claims against Davis. Davis, as the project developer and seller, owed a duty to its purchasers to provide a product which was constructed in conformance with the

standards of the industry, the Utah Condominium Act, and the required building codes. The duty extends beyond the contractual relationship between the parties. Utah law provides and permits parties with contracts, under certain circumstances, to pursue tort claims against the other party. The trial court dismissed the Association's tort claims concluding that all tort claims are barred by the Economic Loss Rule. As discussed below, the Economic Loss Rule is not applicable to the case at hand. The trial court committed error by dismissing the Association's tort claims.

Accordingly, the judgment of the trial court against the Association should be reversed and remanded for further proceedings.

ARGUMENT

I. DAVIS DEVELOPED THE CONDOMINIUM PROJECT SUBJECT TO THE UTAH CONDOMINIUM OWNERSHIP ACT AND WARRANTED THAT THE PROJECT WOULD BE BUILT IN ACCORDANCE WITH THE BUILDING CODES

Davis argued and the trial court found that the breach of contract/warranty cause of action should be dismissed because there was no representation or warranty regarding the construction of the condominium project. This is not the case. Davis' acknowledges it was the owner/developer of the Project. Davis' does not dispute that it constructed the development pursuant to the Utah Condominium Ownership Act. The Condominium Declaration for Snow Flower Condominiums ("Condominium Declaration") which were prepared by Davis and recorded against the property clearly states that the project was

subject to the Utah Condominium Ownership Act. The Condominium Declaration was filed with the Summit County Recorder on September 25,1978, Book M120, Page 274 - 328, Entry No. 149679, before the any of the units were sold. (See Affidavit of Davis, generally; R. 156-59; Condominium Declaration; R. 165-69; Survey Map; R. 180; See Addendum)

Through the Condominium Declaration, Davis has expressly represented the condition of the project and its intention for development. On page one of the Condominium Declaration it states: "THIS DECLARATION is made on the date hereinafter set forth by SNOW FLOWER, LTD., a limited partnership ("DECLARANT")". Snow Flower, Ltd. and its General Partner Jack W. Davis are the named Defendants in this action. Subsequently on page one under "ARTICLE I, RECITALS, paragraph B," Davis states as follows:

> Declarant has improved said real property by constructing thereon a condominium project in accordance with the plans and drawings set forth in the Record of Survey Map . . . Declarant intends to establish said condominium project under and pursuant to the provisions of the Utah Condominium Ownership Act. (R. 169)

"ARTICLE I, RECITALS, paragraph D," states as follows:

> Declarant hereby declares that said real property shall be held, conveyed, mortgaged, encumbered, leased, rented, used, occupied, sold, and improved, subject tot he provisions and conditions of the following declarations, limitations, covenants, conditions, restrictions, and easements, all of which, pursuant to the provisions of the Utah Condominium Act, shall be enforceable equitable servitudes, where reasonable, and shall run with the land, and shall be binding upon Declarant and its successors and assigns,

> and all parties having or acquiring any right, title or interest in or to any portion of said real property.

Page six of the Declaration under "ARTICLE IV, DESCRIPTION OF THE CONDOMINIUM PROJECT, paragraph 2, DESCRIPTION OF IMPROVEMENTS" reads as follows:

> The two buildings and other structures and improvements which constitute the Condominium Project were constructed by Declarant in accordance with specifications contained in the Map. (R. 168)

As part of the development, Davis prepared and recorded on the subject property a Record of Survey Map ("Survey Map") with the Summit County Recorder relating to this project. As part of the Survey Map under the section titled "Owners Certificate and Consent to Record", Davis certified that it was "submitting the described property to the Utah Condominium Ownership Act." (R. 181; See Addendum)

Further, the Declaration on page six under 'ARTICLE III, APPLICABILITY OF ACT," it states that "it is the intention of Declarant that the provisions of the Act shall apply to the Condominium Project and that the provisions of this Declaration shall be construed in accordance therewith." (R. 168)

Thereafter, Davis began to market and sell the individual condominium units. Davis entered into various types of sales agreements. (F of F #3; R. 215; Affidavit of Davis, #6; R. 186; See Addendum) Each of these agreements specifically referred to both the Condominium Declarations and the Survey Map. (See Addendum). When Davis

ultimately transferred title to the units, the Warranty Deeds likewise specifically referred to both the Condominium Declaration and the Survey Map. (F of F #7; R. 214; See Addendum).

Under the public documents recorded on the subject property, the Condominium Declaration and the Survey Map for the Project, and the sales documents and warranty deeds, Davis expressly represented that the condominiums would be constructed in compliance with the Utah Condominium Ownership Act.

As such, it is necessary to look at the Utah Condominium Ownership Act and determine its application and requirements as it relates to the dispute at hand. When discussing the Utah Condominium Ownership Act, the Utah Supreme Court stated that the "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another. . ." Brickyard Homeowners Association Management Committee v. Gibbons Realty Company, 668 P.2d 535, 538 (Utah 1983). All provisions of the Utah Condominium Ownership Act have an intended purpose and must be construed to give effect to that purpose.

The Utah Condominium Ownership Act contains a provision which is pertinent to this dispute. It specifically requires that a condominium project be built according to the building codes. The Association is not alleging or asserting that minor quality standards have not been met, the facts indicate that the condominium project has significant defects

where the construction does not even meet the minimum building codes. Section 57-8-35(2) of the Act states:

> Nothing in this chapter shall be interpreted to state or imply that a condominium project, unit, association or unit owners, or management committee is exempt by this chapter from compliance with the zoning ordinance, building and sanitary codes, and similar development regulations which have been adopted by a municipality or county. No condominium project or any use within said project or any unit or parcel or parcel of land indicated as a separate unit or any structure within said project shall be permitted which is not in compliance with said ordinances and codes. (Emphasis added.)

The stated purpose in this provision was in ensure and require that condominium projects be built in compliance with the governing ordinances and building codes. If this provision were interpreted any other way, the specific language would have to be completely ignored and the provision would be rendered meaningless. This condominium project developed by Davis is no exception to the provision.

The trial court ruled that there were no express warranties contained in the written sales agreements or warranty deed. The trial court acknowledged that the documents do refer to the Condominium Declaration and Survey Map, but ruled that those do not create any warranties. (F of F #5; R. 215) The Association asserts that this ruling was in error in that the trial court ignored the Utah Condominium Ownership Act and its requirement that the Project be built in compliance with all building codes.

It is undisputed that the Project was and is subject to Utah Condominium Ownership Act. The written documents surrounding the sales of the condominiums

represent that the Project was subject to and would be developed in accordance with the Utah Condominium Ownership Act. Davis certified by recorded documents that the project would be built in compliance with the Utah Condominium Act. (See Affidavit of Davis, generally; R. 156-59; Condominium Declaration; R. 165-69; Survey Map; R. 180; See Addendum) This certification includes the warranty that the Project would be built in compliance with all building codes. The Association has the right to maintain its action against Davis under this express warranty.

These express representations and requirements to the Association were breached when the condominium project was not built in compliance with the building codes. As alleged by the Association in its Complaint, and as set forth in the affidavit of its expert, the project was not built according to the building codes. (See Affidavit of Rhoades ¶¶ 7, 8, and 9; R. 163) Davis does not dispute the fact that the Project was constructed in violation of the building codes.

Accordingly, the trial court committed error by ruling that there was no express warranty as described above. The Association requests that the trial court's ruling be reversed and this matter be remanded for further proceedings.

II. DAVIS HAS BREACHED ITS IMPLIED WARRANTY AND BREACH OF IMPLIED WARRANTY OF FITNESS

Implied warranties arise from the seller-purchaser relationship between the parties. With the construction and sale of a project, the developer impliedly warrants that the

improvements are built in accordance with reasonable workmanship standards and are fit for an intended purpose. The developer of new construction makes implied representations and warranties which are indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building. On the other hand, the purchasers do not usually possess the knowledge of the builder and are unable to fully examine a complete unit and its components without disturbing the finished product, especially when the alleged defects are hidden behind the walls and not detectable. Based upon this rationale, the developers of new construction should be held to an implied warranty that the completed structure was designed and constructed in a reasonably workmanlike manner.

In Strathmore Riverside v. Paver Development Corp., 369 So. 2d 971 (Fla. 2d DCA 1979), the court recognized a cause of action for breach of implied warranty of compliance with plans and specifications approved by a governmental body, compliance with applicable building codes, and of fitness and merchantability, as to original purchasers in privity with developer. These types of warranties are provided at the transfer of property.

As argued above, Davis has specifically, or at a minimum impliedly, represented and warranted to the Association that the condominiums were built in accordance the Utah Condominium Ownership Act. This required that the condominiums would be built in compliance with the building codes and local ordinances. However, the facts now

demonstrate that the condominiums were not built in compliance with the applicable building codes and ordinances. (Affidavit of Rhoads, # 7 and 8; R. 163)

The Association filed this action alleging breach of implied warranty and breach of implied warranty of fitness. Davis argued relying upon American Towers and its citation of Maack dealt with a separate warranty, the implied warranty of habitability. The facts and circumstances of American Towers are distinguishable and not controlling in this matter. In American Towers, the association was attempting to sue the contractors directly for defective work on the project rather than the original developer. The issues addressed on appeal in American Towers dealt with claims against remote parties, not parties with a direct contractual relationship as in the case at hand. The Association in the case at hand is not asserting claims against the contractors who constructed the building. The Association, through its member, has brought this action against Davis, the original developer who sold the defective units to the Association's members. Further, the Supreme Court in American Towers did not address the Utah Condominium Ownership Act and the implied warranty provided therein as argued in this case.

Homeowner associations have in the past brought breach of implied warranty claims. In Brickyard Homeowners' Association Management Committee v. Gibbons Realty Company, 668 P.2d 535 (Utah 1983), the association sued for, among other theories, "breach of implied warranty of fitness." The Supreme Court permitted that action to go forward.

The Association in its Complaint sets forth a claim under these implied warranty theories upon which relief may be granted. Accordingly, the trial court committed error by ruling that there was no implied warranty as described above. The Association requests that the trial court's ruling be reversed and this matter be remanded for further proceedings.

III. THE ASSOCIATION IS NOT PRECLUDED FROM MAINTAINING AN ACTION IN TORT AGAINST DAVIS

While the Association does have contractual claims against Davis, those claims do not preclude the assertion of additional tort claims. Developers, such as Davis, may be strictly liable in tort for damages resulting from dangerous and defective improvements constructed and sold by them to members of the public. Developers may further be held liable for negligence if the design or construction of the project falls below the standard of care exercised by developers of similar properties within the same community.

In Interwest Construction v. Palmer, 923 P.2d 1350 (Utah 1996), the Supreme Court stated:

> We agree that a buyer of products or services may, in some circumstances, assert tort claims along with breach of contract claims against a supplier. That recognition is nothing more than an acknowledgment that virtually all courts have permitted certain actions – for example, products liability – to include claims sounding in both tort and contract.

In that case, the party "alleged that its suppliers failed to use reasonable care to prevent foreseeable harm to others (negligence) or manufactured and sold the [products] in a

defective condition that made them unreasonably dangerous to others (strict liability)." Interwest at 1355. The Supreme Court stated that the terms of the contract between the parties was "insufficient as a matter of law to exempt [the parties] suppliers from strict tort or negligence liability." Interwest at 1356.

In another Supreme Court case, it was held that tort and contract claims are not mutually exclusive. In DCR Incorporated v. Peak Alarm Company, 663 P.2d 433 (Utah 1983), the Supreme Court held that "contractual relationships for the performance of services impose on each of the contracting parties a general duty of due care toward the other, apart from the specific obligations expressed in the contract itself." Id at 435. The Supreme Court went on to state that "a party who breaches a duty of care toward another may be found liable to the other in tort, even where the relationship giving rise to such a duty originates in a contract between the parties." Id at 435. Further, in Brickyard Homeowners' Association Management Committee v. Gibbons Realty Company, 668 P.2d 535 (Utah 1983), the Supreme Court allowed the association to maintain its cause of action for "negligence and failure to perform specific work in a good and proper workmanlike manner." Id. at 542.

Also, in Culp Construction Co. v. Buildmart Mall, 795 P.2d 650, 654-55 (Utah 1990), the Utah Supreme Court, in citing Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985), states:

> 'We recognize that in some cases the acts constituting a breach of contract may also result in breaches of duties that are independent of the contract and may give rise to causes of action in tort.' Statutory requirements that give rise to independent causes of action under [other theories] may also give rise to independent tort actions.

The Association as alleged herein asserts that Davis has a contractual duty (i.e. warranties) to construct the condominium project in compliance with the building codes. Likewise, analogous with the ruling in Culp, Davis has a independent duty as provided by the Utah Condominium Ownership Act to construct the condominium project in compliance with the building codes. This independent statutory duty gives rise to the Association's tort cause of action.

The trial court dismissed the Association's tort causes of action based upon the Economic Loss Rule and American Towers. As argued above, American Towers is distinguishable. American Towers deals only with claims for economic losses against remote third parties. Here, the Association has both a contractual relationship and is owed independent duties of due care by Davis. The Economic Loss Rule as set forth in American Towers does not bar the Associations tort claims against Davis.

Davis, as the project developer and seller, owed a duty to its purchasers to provide a product which was constructed in conformance with the standards of the industry and the building codes. Davis' duty extended to the quality of the work which was performed by its contractors. Davis knew, or should have known, that the purchasers would not be able to discover at the time of purchase the defective construction which was hidden in

the walls of the buildings. The defective workmanship included work that did not meet the applicable building codes in existence at the time of the sale. The purchasers were not aware of the defects and relied upon Davis' skill, judgment and expertise as the developer in constructing the buildings and that they would be fit for their intended purpose.

The defective conditions were only recently discovered when the walls were opened up as part of an upgrading project. The buildings have significant building deficiencies which have a direct impact on the safety to the inhabitants of the structure and must be corrected to bring the buildings into compliance with the building codes. This has caused significant damages to the Association. (F of F #8; R. 214) Davis has breached its duty to the Association for which the law provides a remedy not only in contract, but also in tort. Davis failed to use reasonable care to prevent foreseeable harm to the Association amounting to negligence and sold the units in a defective condition that made them unreasonably dangerous to others amounting to liability under the theory of strict liability.

Accordingly, the trial court committed error by ruling that there tort theories were barred by the Economic Loss Rule as described above. The Association requests that the trial court's ruling be reversed and this matter be remanded for further proceedings.

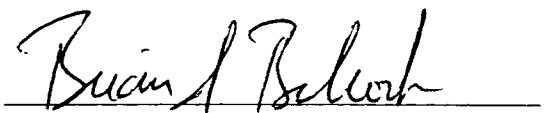
CONCLUSION

As set forth above, there are various legal theories upon which the Association may seek recovery for the defective units which were sold by Davis. Under the relevant

case law, the Utah Condominium Ownership Act, and the facts of this case, the Association has provided evidence and a legal basis which supports its claim of the existence of a warranty and that said warranty has been breached by Davis. The Association has also provided the basis for it implied warranty claims. Also, there are tort causes of action which are available to the Association independent of the contract claims. For the reasons contained herein, the Association respectfully requests that the trial court's rulings be reversed and the matter be remanded to trial.

DATED this 21st day of August, 2000.

BABCOCK, BOSTWICK, SCOTT
CRAWLEY & PRICE



By: Robert F. Babcock
Brian J. Babcock
Attorneys for Appellant/Plaintiff

ADDENDUM

No. _____

FILED
DEC - 1 1998
Third District Court
By _____
Deputy Clerk, Summit County

S. BAIRD MORGAN [A2314]
KRISTA A. WEBER [A8019]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendants
Key Bank Tower, Seventh Floor
50 South Main Street
P O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

SNOW FLOWER HOMEOWNERS ASSOCIATION, Plaintiff, vs. SNOW FLOWER, LTD., JACK W. DAVIS, INC., a California corporation, and DOES 1 through 100, Defendants.	**AMENDED ORDER ON MOTION TO DISMISS** Civil No. 980600012 Judge Pat Brian

Whereas the above-entitled Court has received and reviewed the parties' supplemental memoranda with regard to plaintiff's objections to the Court's prior Order, and the parties hereto, by and through their respective counsel of record, having stipulated to the terms of this Order, now therefore;

IT IS HEREBY ORDERED, DECREED AND ADJUDGED as follows:

A. Defendant's Motion to Dismiss be and is hereby granted as to the First and Third Causes of Action. The Court finds the said Causes of Action sound in tort, not contract, and are barred by the Economic Loss Rule.

B. Defendant's Motion to Dismiss be and is hereby denied as to plaintiff's Second, Fourth and Fifth Causes of Action. However, all defenses with regard to these claims are reserved.

C. Nothing herein shall be construed as a waiver or discharge of any right of appeal on the part of any party.

DATED this 1 day of November, 1998.

BY THE COURT:

THE HONORABLE PAT BRIAN
Third Judicial District Court Judge

APPROVED AS TO FORM:

Robert F. Babcock
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Order on Motion to Dismiss was mailed, first-class, postage prepaid, on this 3rd day of ~~November~~ December, 1998, to the following:

Robert F. Babcock
WALSTAD & BABCOCK
57 West South Temple 8th Floor
Salt Lake City, Utah 84101

Debbie K. Joust

0116

Rec'd @ J.C. 3/14/00

No.

FILED
MAR 17 2000
Third District Court
By Deputy Clerk Summit County

Ronald G. Russell, Esq. (4134)
Brett J. Swanson, Esq. (7641)
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, Utah 84147-0019
Telephone: (801) 532-7840

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

SNOW FLOWER HOMEOWNERS ASSOCIATION, Plaintiff, vs. SNOW FLOWER, LTD., JACK W. DAVIS, INC., a California corporation, and DOES 1 through 100, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Civil No. 980600012

This matter came before the court for oral argument on Wednesday, February 16, 2000, on defendants' Motion for Summary Judgment. Plaintiff Snow Flower Homeowners Association was represented by Robert F. Babcock. Defendants Snow Flower, Ltd. and Jack W. Davis, Inc. were represented by Ronald G. Russell and Brett J. Swanson.

UNDISPUTED FACTS

Based on the record herein, the court finds that the following facts are undisputed for purposes of defendants' summary judgment motion:

1. In or about 1978 and 1979, defendant Snow Flower, Ltd. contracted for the construction of the Snow Flower Condominiums.

2. The condominiums, which consist of two separate buildings, were constructed in or about 1979.

3. Snow Flower, Ltd. sold individual units of the condominiums to original purchasers pursuant to earnest money agreements and uniform real estate contracts. The earnest money agreements and uniform real estate contracts relating to the sales were identical to those attached as exhibits to the Affidavit of Jack Davis so far as any warranties are concerned.

4. None of the earnest money agreements or uniform real estate contracts contained any express warranties relating to construction defects or deficiencies.

5. Title to the units was conveyed by Snow Flower, Ltd. to the original condominium purchasers pursuant to warranty deeds which did not provide any express warranties against construction defects.

6. The Snow Flower Condominiums were established pursuant to a condominium declaration recorded at the Summit County Recorder's office as Entry No. 149679, in Book M120, at Page 274 and a three-page record of survey map recorded September 25, 1978 as Entry No. 149678.

7. The warranty deeds by which the condominium units were conveyed by Snow Flower, Ltd. to the original purchasers describe the units conveyed by reference to the condominium declaration and record of survey map.

8. The Snow Flower Homeowners Association recently contracted for the remodel of certain portions of the condominium buildings. During the course of that remodeling project, plaintiff asserts that defects in the original 1979 construction of the buildings were discovered. In particular, plaintiff claims that there were violations of the 1976 building code, which code was referenced in the original construction drawings and specifications dated March 30, 1978.

9. The record of survey map is a separate and different document from the construction drawing, plans and specifications.

CONCLUSIONS OF LAW

Based on the foregoing undisputed facts, including the court's review of the earnest money agreements, uniform real estate contracts, and warranty deeds used in the conveyances to the original condominium purchasers, the court makes the following Conclusions of Law:

1. There are no express warranties against construction defects in any agreement between Snow Flower, Ltd. and the original condominium purchasers. Consequently, there is no basis for a breach of warranty claim based on alleged construction defects under the earnest money agreements or the uniform real estate contracts.

2. The warranty deeds by which title was conveyed to the original condominium purchasers do not contain any express warranties against construction defects. The description of the unit conveyed in the warranty deed by reference to the condominium declaration and record of survey map does not express any warranties against construction defects, nor does it indicate an intent to create such warranties. The warranties provided by a warranty deed under Utah law are prescribed by statute and relate only to the title conveyed. See Utah Code Ann. § 57-1-12.

3. Neither the condominium declaration nor the record of survey map create contractual warranties between Snow Flower, Ltd. and the condominium purchasers.

4. Utah adheres to the doctrine of caveat emptor and, in the absence of an express warranty in the contract documents between Snow Flower, Ltd. and the condominium purchasers, plaintiff's Second Cause of Action for breach of contract - warranty fails as a matter of law.

5. Plaintiff's Fourth Cause of Action and Fifth Cause of Action for breach of implied warranties fail under the Utah Supreme Court's decision in American Towers Owners Ass'n Inc. v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996), and the reasoning set forth therein.

ORDER

Based on the foregoing and for the reasons set forth in defendants' memoranda supporting their summary judgment motion,

IT IS HEREBY ORDERED that defendants' Motion for Summary Judgment is granted. Accordingly, the court will enter a final judgment dismissing the plaintiff's Complaint herein with prejudice and on the merits.

DATED this 17th day of March, 2000.

BY THE COURT:

/s/ Robert Hilder

Honorable Robert K. Hilder
District Court Judge

APPROVED AS TO FORM:

Robert F. Babcock, Esq. of
BABCOCK BOSTWICK SCOTT CRAWLEY & PRICE
Attorneys for Plaintiff

Ronald G. Russell, Esq. of
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2000 a true and correct copy of the foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, to:

Robert F. Babcock, Esq.
Brian J. Babcock, Esq.
BABCOCK BOSTWICK SCOTT CRAWLEY & PRICE
57 West South Temple, Suite 800
Salt Lake City, Utah 84101

Ronald G. Russell, Esq.

Ronald G. Russell, Esq. (4134)
Brett J. Swanson, Esq. (7641)
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, Utah 84147-0019
Telephone: (801) 532-7840

No. _____

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

SNOW FLOWER HOMEOWNERS ASSOCIATION, Plaintiff, vs. SNOW FLOWER, LTD., JACK W. DAVIS, INC., a California corporation, and DOES 1 through 100, Defendants.	FINAL JUDGMENT Civil No. 980600012

The court having dismissed plaintiff's First Cause of Action and Third Cause of Action pursuant to an order dated December 1, 1998, and having entered its Order Granting Defendants' Motion for Summary Judgment as to plaintiff's Second Cause of Action, Fourth Cause of Action, and Fifth Cause of Action, the court hereby enters its Final Judgment in this case.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's Complaint be and the same is hereby dismissed with prejudice and on the merits.

DATED this 17th day of March, 2000.

BY THE COURT:

Honorable Robert K. Hilder
District Court Judge

APPROVED AS TO FORM:

Robert F. Babcock, Esq. of
BABCOCK BOSTWICK SCOTT CRAWLEY & PRICE
Attorneys for Plaintiff

Ronald G. Russell, Esq. of
PARR/WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2000 a true and correct copy of the foregoing FINAL JUDGMENT was mailed, postage prepaid, to:

Robert F. Babcock, Esq.
Brian J. Babcock, Esq.
BABCOCK BOSTWICK SCOTT CRAWLEY & PRICE
57 West South Temple, Suite 800
Salt Lake City, Utah 84101

Ronald G. Russell, Esq.

Insurance Pg 26-29

WHEN RECORDED MAIL TO:

Jon C. Heaton, Esq.
Prince, Yeates & Geldzahler
455 South Third East Street
Salt Lake City, Utah 84111

BOOK M120 PAGE 274

CONDOMINIUM DECLARATION
FOR SNOW FLOWER CONDOMINIUMS

THIS DECLARATION is made on the date hereinafter set forth by SNOW FLOWER, LTD., a limited partnership ("DECLARANT").

ARTICLE I
RECITALS

A. Declarant is the owner of certain real property located in Summit County, Utah, a legal description of which is attached hereto as Exhibit A and incorporated herein by this reference.

B. Declarant has improved said real property by constructing thereon a condominium project in accordance with the plans and drawings set forth in the Record of Survey Map filed concurrently herewith, consisting of 3 sheets, prepared by J.J. Johnson & Associates, Engineers and Surveyors, and certified by James G. West, a registered land surveyor. Said condominium project shall be known as Snow Flower Condominiums. Declarant intends to establish said condominium project under and pursuant to the provisions of the Utah Condominium Ownership Act.

C. The aforestated condominium project shall contain 82 condominium units. The Declarant, by this Declaration, hereby establishes a plan for the ownership of real property estates whereby the owner of each such unit

Entry No. 149679 Book M120
RECORDED 9-25-78 at 4:05 PM Page 274
REQUEST of Summit Co. Title 328
FEE $58.00 WANDA Y. SPRIGGS, SUMMIT CO. RECORDER
By Wanda Y. Spriggs
INDEXED ABSTRACT

will receive title to his individual unit, an undivided interest in the Common Areas and Facilities contained in said condominium project, as the same are defined herein, and an undivided interest in the Manager's Unit, as the same is defined herein. Each unit shall have appurtenant to it a membership in the Association of Unit Owners, as defined herein, the organization which shall administer and control the Common Areas and Facilities and the Manager's Unit.

D. Declarant intends by this Declaration to impose upon the real property referred to in paragraph A above mutually beneficial restrictions under a general plan of improvement for the benefit of all of said condominium units and the owners thereof.

Declarant hereby declares that said real property shall be held, conveyed, mortgaged, encumbered, leased, rented, used, occupied, sold, and improved, subject to the provisions and conditions of the following declarations, limitations, covenants, conditions, restrictions, and easements, all of which, pursuant to the provisions of the Utah Condominium Act, shall be enforceable equitable servitudes, where reasonable, and shall run with the land, and shall be binding upon Declarant and its successors and assigns, and all parties having or acquiring any right, title or interest in or to any portion of said real property.

BOOK 120 PAGE 275

ARTICLE II

DEFINITIONS

1. INTERPRETATION: Those definitions contained in the Utah Condominium Act, to the extent they are not inconsistent with the foregoing definitions, shall be and are hereby incorporated herein by this reference and shall have the same effect as if expressly set forth herein and made a part hereof.

2. DEFINITIONS:

(a) "Declarant" shall mean and refer to Snow Flower, Ltd., a limited partnership.

(b) The "Act" shall mean and refer to the Utah Condominium Ownership Act, Utah Code Annotated 1953, Sections 57-8-1 through 57-8-36, as the same may be amended from time to time.

(c) "Condominium Project" shall mean and refer to the entire Property, as defined below, together with all rights, obligations and organizations established by this Declaration. The Condominium Project shall be known as Snow Flower Condominiums.

(d) "Condominium" shall mean and refer to a single unit in the Condominium Project together with an undivided interest in common with other Unit Owners in the Common Areas and Facilities and an undivided interest in common with other Unit Owners in the Manager's Unit.

(e) "Declaration" shall mean and refer to this Condominium Declaration for Snow Flower Condominiums.

(f) "Property" shall mean and refer to the real property referred to in Article I herein, the buildings and all structures and improvements located thereon, all easements, rights and appurtenances belonging thereto and all articles of personal property intended for use in connection therewith.

(g) "Map" shall mean and refer to the Record of Survey Map of Snow Flower Condominiums recorded by Declarant.

(h) "Unit," as the same is shown on the Map, shall mean and refer to a separate physical part of the Property intended for any type of independent use.

(i) "Unit Owner" or "Owner" shall mean the entity or person(s) owning a Unit in the Condominium Project and an undivided interest in the Common Areas and Facilities and the Manager's Unit. The term Unit Owner or Owner shall include contract sellers but shall exclude persons or enti-

BOOK 120 PAGE 276

ARTICLE III

APPLICABILITY OF ACT

It is the intention of Declarant that the provisions of the Act shall apply to the Condominium Project and that the provisions of this Declaration shall be construed in accordance therewith.

ARTICLE IV

DESCRIPTION OF THE CONDOMINIUM PROJECT

1. LOCATION: The Condominium Project is located on certain real property located in Summit County, Utah, as more particularly described in Exhibit A hereto.

2. DESCRIPTION OF IMPROVEMENTS: The two buildings and other structures and improvements which constitute the Condominium Project were constructed by Declarant in accordance with specifications contained in the Map. Said buildings contain a total of 82 units and are of frame construction. Units contained therein are either of studio type design or contain one, two, three or four bedrooms. Each Unit has a dishwasher, fireplace and whirlpool type soaking tub. All Units are totally electric as to heating and appliances. Electricity is separately metered to each Unit. Each Unit has a separate electric water heater.

3. DESCRIPTION AND LEGAL STATUS OF UNITS: Both the Map and the schedule attached hereto as Exhibit "C" and incorporated herein by this reference show the Unit number of each Unit and each Unit's respective location. Each Unit shall include that part of the building containing the Unit which lies within the boundaries of the Unit, which boundary shall be determined in the following manner: the upper boundary shall be the plane of the lower surface of the ceiling; the lower boundary shall be the plane of the upper surface of the floor; and the vertical boundaries of the

BOOK 120 PAGE 279

right to change the interior design and interior arrangement of any Unit and to alter the boundaries between Units, so long as the Declarant owns the Units so altered. Any change of the boundaries between Units or of Common Areas and Facilities shall be reflected by an amendment of this Declaration and to the Map, which amendments, notwithstanding the provisions of Article XXIII herein, may be executed solely by the Declarant. However, no such change shall increase the number of Units nor alter the boundaries of the Common Areas and Facilities without amendment of this Declaration and of the Map in the manner described in Article XXIII of this Declaration. If the boundaries between Units are altered, in the amendment related thereto, the Declarant shall reapportion the percentage of ownership in the Common Areas and Facilities which are allocated to the altered Units on the basis of the change in floor space which results from the boundary alteration.

ARTICLE VI

STATEMENT OF PURPOSE AND RESTRICTION ON USE

1. PURPOSE: The purpose of the Condominium Project shall be to provide residential housing space for Unit Owners, their families, guests and lessees and to provide parking and recreational space for use in connection therewith, all in accordance with the provisions of the Act.

2. RESTRICTIONS ON USE: In addition to all of the covenants contained herein, the use of the Units and Common Areas and Facilities are subject to the following:

(a) Each of the Units shall be occupied only as a residence and for no other purpose. No business shall be operated in or from any Unit other than the rental of the Unit itself. Each parking stall shall be used for the parking or storage of operable motor vehicles and for no other purpose. No unit Owner shall use or cause to be used, at any time, more than

ditions to be determined by the Management Committee in its sole discretion. The instrument of conveyance shall be signed by two members of the Management Committee, whose signatures shall be sufficient to convey all of the right, title and interest of the Unit Owners in and to the Manager's Unit, each Unit Owner hereby appointing the then members of the Management Committee as his attorneys-in-fact to execute such instrument on his behalf. The proceeds of the sale shall be applied first to pay all outstanding assessments and charges against and accrued expenses of the Manager's Unit, then to pay the expenses of preparing the Unit for sale and selling it, with the balance, if any, remaining either applied against common expenses, placed in a suitable reserve or distributed among the Unit Owners in proportion to their ownership interest in the Manager's Unit (the determination of the foregoing being within the sole discretion of the Management Committee).

ARTICLE XXXIII

EFFECTIVE DATE

This Declaration shall take effect upon recordation.

IN WITNESS WHEREOF, the undersigned has caused this Declaration to be executed on its behalf this 14th day of August, 1978.

SNOW FLOWER, LTD.,
a limited partnership,

By: Jack W. Davis, Inc.,
(General Partner)

By: Jack W. Davis
Jack W. Davis, President

BOOK M120 PAGE 315

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On this 14th day of AUGUST, 1978, personally appeared before me JACK W. DAVIS, who, being by me first duly sworn, did declare that he is the PRESIDENT of Jack W. Davis, Inc., a general partner of Snow Flower, Ltd., that he signed the foregoing document as such PRESIDENT of the corporation, that said instrument was signed on behalf of and by authority of Jack W. Davis, Inc., and said HE acknowledged to me that he executed the same.

OFFICIAL SEAL
Cynthia Ann Goodrich
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires September 26, 1980

Cynthia Ann Goodrich
Notary Public
Residing at: Cynthia Ann Goodrich
San Diego County
State of California

My commission expires: September 26, 1980

H. M. Calvert

ACKNOWLEDGEMENT

STATE OF UTAH)
) ss
COUNTY OF)

BE IT REMEMBERED On this 22 day of September 1978, personnally appeared before me, the undersigned Notary Public in and for said county and state, H. M. Calvert and John B. Anderson of Prudential Federal Savings and Loan Association, a Utah Corporation, who being duly sworn, did say that the within and foregoing Mortgagees Certificate and Consent To Record was duly executed and signed for and in behalf of said corporation and that said corporation did execute the same.

Notary Public Jeanne Heske
Residing at Salt Lake City, Utah

My Commission Expires
3-22-80

OWNERS CERTIFICATE AND CONSENT TO RECORD

KNOW ALL MEN BY THESE PRESENTS that SNOW FLOWER LTD., A Calif. Limited Partnership by and through their authorized general partner Jack W. Davis, Inc., and Jack W. Davis, Inc., the owners of the tracts of land described hereon and SNOW FLOWER CONDOMINIUM, A Utah Condominium Project located on said tracts of land do hereby make this certificate that the partnership and corpomation have caused a survey to be made, and this record of survey map consisting of 3 sheets to be prepared the partnership and the corporation have consented and do hereby consent to the recordation of this record of survey map in accordance with the Utah Condominium Ownership Act. Submitting the described property to the Utah Condominium Ownership Act

IN WITNESS WHEREOF, he has set his hand this 5 day of June 1978

Jack W Davis
JACK W. DAVIS, PRESIDENT
JACK W. DAVIS, INC., and JACK W. DAVIS, INC., as GENERAL PARTNER of
SNOW FLOWER LTD., A Calif. Limited Partnership

W FLOWER CONDOMINIUMS

"A UTAH CONDOMINIUM PROJECT"

ED IN SOUTHWEST QUARTER OF SECTION 9 AND
SECTION 16 TOWNSHIP 2

RECORDED 4:00 P.

RECORDED NO 149678 Sept. 25, 197

FILED AND RECORDED FOR Summit Co Title

PAGE Filed BOOK

FEE $56.00 Wanda W. Spriggs
SUMMIT COUNTY RECORD

, IS A LEGALLY BINDING CONTRACT, IF NOT UNDE OOD, SEEK C PETENT ADVICE."

EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

TO: Skyline Land Company (Name of Broker Company) Park City, Utah SEPTEMBER 27, 19 78

IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I/we GORDON LUCE AND DONALD VAUGH
hereby deposit with you as earnest money the sum of ($ 2,000.00) Two Thousand and no/100---------- DOLLA
in the form of CHECK
to secure and apply on the purchase of the property situated at: Unit No. 33 , Snow Flower Condominiums, as shown on the Record of Survey Map, subject to the Declaration of Condominiu and all covenants, easements and restrictions of record or enforceable in law or equity.

Park City (City) Summit (County, State of) Utah

including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burner electric light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and an other fixtures except none

The following personal property shall also be included as part of the property purchased: blinds, refrigerator

The total purchase price of ($ 125,000.00 ONE HUNDRED TWENTY-FIVE THOUSAND) DOLLARS
shall be payable as follows: $ 2,000.00 which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you:
$ -0- when seller approves sale; $ all of remaining balance on delivery of deed
which shall be on or before May 1, 19 79 and which shall be commencing
Closing to be earlier at Seller's election upon completion. Within 45 days of Seller's acceptance hereof, Purchaser must show to Seller's satisfaction suitable commitment to finance

as of closing

date of possession shall be All risk of loss and destruction of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be prorated as of date of possession. All other taxes and all assessments, mortgages, chattel liens and and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except: Buyer to pay in advance 2 mos. CAM charges at closing

The following special improvements are included in this sale: Sewer [X]—Connected [X]. Septic Tank and/or Cesspool [ ] Sidewalk [X]. Curb and Gutter [ ] Street Paving [X] Special Street Lighting [ ]. Culinary Water (City [X] Other Community System [ ]. Private [ ] (Legend: Yes (x) No (0).

INSTRUMENT OF CONVEYANCE TO BE MADE ON THE APPROVED FORM OF THE UTAH SECURITIES COMMISSION IN THE NAME OF GORDON LUCE AND DONALD VAUGHN

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within 20 days from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase.

Skyline Land Company (Broker Company) Agent By Gary E. Cole

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with special warranty deed, at seller's option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed. In the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of 4 % of the sale price.
In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

Date Snow Flower LTD (Seller)

Date By Jack W. Davis, Inc., General Partner

11/27/78 By Jack W. Davis

Purchaser

Seller unconditionally covenants that it will complete the construction of the applicable unit and all parts of the common areas and limited common areas of the Snow Flower Condominiums within 2 years of the date of Seller's acceptance hereof.

(State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed.)

RECEIPT

I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:

Seller Date Purchaser Date

I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the [ ] Seller, [ ] Purchaser, on
19 , by registered mail and return receipt is attached hereto.

Broker

0186

"THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 17th day of December, A. D., 19 79, by and between SNOW FLOWER, LTD. a partnership hereinafter designated as the Seller, and BERNARD ROBINSON hereinafter designated as the Buyer, of _____

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Summit, State of Utah, to wit: _____ ADDRESS

More particularly described as follows:

Unit 26, SNOW FLOWER CONDOMINIUMS, together with a 1.18% undivided ownership in the common areas and facilities, and Unit 40, SNOW FLOWER CONDOMINIUMS, together with a 1.56% undivided ownership in the common areas and facilities, according to the Condominium Declaration and Record of Survey Map recorded September 25, 1978 as Entry Nos. 149678 and 149679, respectively, in the office of the Summit County Recorder.

TOGETHER with furniture package in units.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of ONE HUNDRED FORTY FIVE THOUSAND, ONE HUNDRED TWENTY-FOUR AND 42/100---------Dollars ($145,124.42) payable at the office of Seller, his assigns or order _____ strictly within the following times, to-wit: _____ ($_____) cash, the receipt of which is hereby acknowledged, and the balance of $145,125.42 shall be paid as follows:

Due in full upon resale of units, or 1 year, whichever first occurs.

Possession of said premises shall be delivered to buyer on the 17th day of December, 1979

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall ~~xxxxxxxxxxxx~~ not be charged on all unpaid portions of the purchase price at the rate of no per cent (none %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of _____ Prudential Federal Savings & Loan with an unpaid balance of $_____, as of _____

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following: none

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed _____ percent (_____%) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

none

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

12. The Buyer agrees to pay the general taxes after December 17, 1979

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or $ ---------- and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of ¾ of one percent per month until paid.

15. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within 30 days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid.

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto none

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

20 Feb 1980

Seller

Buyer

Approved Form:

CLARK 302 1980 © GEM PRINTING CO. — SALT LAKE CITY

Uniform Real Estate Contract

To

No.

Recorded at Request of _____

at _____ M. Fee Paid $_____

by _____ Dep. Book _____ Page _____ Ref.: _____

Mail tax notice to _____ Address _____

WARRANTY DEED

(Special)

SNOW FLOWER LTD., A Utah Limited Partnership grantor

of Park City, Utah County of Summit State of Utah hereby

CONVEY AND WARRANT against all claiming by, through or under

to JOHN C WEATHERWAX & ROSEMARY L WEATHERWAX, husband and wife
J CRAIG WEATHERWAX & JENNIFER L WEATHERWAX,
husband and wife, as joint tenants grantee

of for the sum of

TEN AND NO/100--- and other good and valuable consideration----------DOLLARS,

the following described tract of land in SUMMIT County,

State of Utah:

Unit 72, SNOW FLOWER CONDOMINIUMS, together with a .59% undivided ownership in the common areas and facilities according to the Condominium Declaration and Record of Survey Map recorded September 25, 1978 as Entry No.'s 149678 and 149679, respectively, in the office of the Summit County Recorder.

WITNESS, the hand of said grantor, this Twentieth day of September, A. D. 1979

Signed in the Presence of

SNOW FLOWER LTD., a Utah Limited Partnership

By: Jack W. Davis, general partner

STATE OF UTAH,
County of SUMMIT } ss.

On the 20TH day of SEPTEMBER, A. D. 1979 personally appeared before me JACK W. DAVIS, as general partner of SNOW FLOWER LTD. the signer of the within instrument, who duly acknowledged to me that he executed the same freely and voluntarily on behalf of SNOW FLOWER LTD., a Utah Limited Partnership, as general partner therein.

DWAYNE C. HUFFMAN NOTARY PUBLIC STATE OF UTAH

Wayne C. Huffman
Notary Public.

My commission expires 11-10-81 Residing in Park City

BLANK NO. 104 — © GEN. PTG. CO. — 3215 SO. 2900 EAST — SALT LAKE CITY

Robert F. Babcock #0158
Brian J. Babcock #6172
BABCOCK BOSWICK et al
57 West South Temple, 8th Floor
Salt Lake City, Utah 84101
Telephone: (801) 531-7000
Facsimile: (801) 531-7060

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

SNOW FLOWER HOMEOWNERS ASSOCIATION, Plaintiff, vs. SNOW FLOWER, LTD., JACK W. DAVIS, INC. a California corporation, and DOES 1 through 100, inclusive, Defendants.	**AFFIDAVIT OF JOE A. RHOADS, P.E.** Civil No. 980600012 Judge Ronald E. Nehring

STATE OF UTAH)
) ss
COUNTY OF DAVIS)

JOE A. RHOADS, P.E. being first duly sworn upon oath, deposes and states as follows:

1. I make the following affidavit on personal knowledge.

2. I am a licensed general contractor in the State of Utah.

3. I am a professional engineer licensed in five (5) states including the State of Utah.

4. I am President of The Rhoads Company, Inc. which has been retained by the Snow Flower Homeowners Association in conjunction with the remodel and review of the Snow Flower Condominium project which is the subject of this lawsuit.

5. During the course of my work at the project, I have had the opportunity to review the original drawings and specifications dated March 30, 1978.

6. On sheet "G" of the drawings under the heading "General Notes", note No. 1, it reads: "All construction materials and installation shall comply to the 1976 Uniform Building Code and other Ordinance of Local Governing Authorities."

7. Over the period of time that I have been involved with the project, I, along with the project architect and general contractor, have observed and noted in detail the significant defects in the construction of the project.

8. I have prepared comments as to the variations in the actual construction from that shown on the drawings and specifications. These comments also demonstrate the violations of the 1976 Building Code. All of these issues have been documented and compiled into The Rhoads Company, Inc. Project Record Book Vol. 1 through 11.

9. I have also prepared a photo log and two video tapes which visually document the areas where the construction was in violation of the drawings, specifications, and the Building Code.

10. These documents and photos have been made available and, to the best of my knowledge, have been reviewed by counsel for Defendants.

DATED this 22 day of November, 1999.

Joe A. Rhoads, P.E.

On this 22nd day of November, Joe A. Rhoads acknowledged to me that he executed the foregoing Affidavit and that the statement contained therein are true to the best of his knowledge.

Patsy S. Mercer
NOTARY PUBLIC
Residing at: Bountiful, Utah

My Commission Expires:

August 12, 2002

Notary Public
PATSY S. MERCER
1199 South Main
Centerville, Utah 84014
My Commission Expires
August 12, 2002
State of Utah

No. _____

Ronald G. Russell, Esq. (4134)
Brett J. Swanson, Esq. (7641)
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants Snow Flower, Ltd.
and Jack W. Davis, Inc.
185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1536
Telephone: (801) 532-7840

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

SNOW FLOWER HOMEOWNERS ASSOCIATION, Plaintiff, vs. SNOW FLOWER, LTD., JACK W. DAVIS, INC., a California corporation, and DOES 1 through 100, Defendants.	**AFFIDAVIT OF JACK DAVIS** Civil No. 980600012 Judge Ronald E. Nehring

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

JACK DAVIS, being first duly sworn upon oath, deposes and states as follows:

1. I make the following affidavit on personal knowledge.

2. I am the President of Jack Davis, Inc., which was the general partner of Snow Flower, Ltd. at the time the condominium units of the Snow Flower Condominiums that are the subject of

the above-captioned action (the "Condominiums") were sold by Snow Flower, Ltd. to the original purchasers of those units of the Condominiums.

3. In or about the years of 1978 and 1979, Snow Flower, Ltd. contracted for the construction of the Condominiums.

4. In or about 1979, the Condominiums, which consist of two separate buildings, were constructed.

5. I executed all of the agreements concerning the Condominiums between Snow Flower, Ltd. and the original purchasers of the Condominiums in my capacity as President of Jack Davis, Inc., which was the general partner of Snow Flower, Ltd.

6. The agreements regarding the Condominiums between Snow Flower, Ltd. and the original purchasers of the Condominiums consisted of earnest money contracts, warranty deeds and often real estate contracts.

7. Jack Davis, Inc. did not enter into any agreements concerning the Condominiums with any members of the Snow Flower Homeowners Association.

8. None of the agreements between Snow Flower, Ltd. and the purchasers of the Condominiums contained any of the warranties alleged by the Snow Flower Homeowners Association in its Complaint in the above-captioned action.

9. All of the earnest money agreements between Snow Flower, Ltd. and the original purchasers of the Condominiums are identical to the earnest money agreement attached hereto as Exhibit A in so far as the alleged warranties are concerned.

10. All of the deeds conveying title to the Condominiums from Snow Flower, Ltd. to the original purchasers of the Condominiums are identical to the deed attached hereto as Exhibit B in so far as the alleged warranties are concerned.

11. All of the real estate contracts between Snow Flower, Ltd. and the original purchasers of the Condominiums are identical to the real estate contract attached hereto as Exhibit C in so far as the alleged warranties are concerned.

12. Neither Jack Davis, Inc., Snow Flower, Ltd. or I ever made any warranties as to quality of the Condominiums to any of the purchasers of the Condominiums.

13. There are no oral agreements concerning the Condominiums between either Jack Davis, Inc. or Snow Flower, Ltd. and any members of the Snow Flower Homeowners Association.

14. I have carefully compared the names of the original purchasers of the Condominiums with the names of persons believed by me to still own the same unit of the Condominiums as originally purchased from Snow Flower, Ltd., and, based on that comparison and my personal knowledge, determined to the best of my knowledge that the following persons are the only persons who were original purchasers of a unit or units of the Condominiums and who still own such unit or units:

	Purchaser	Unit Number
a.	Braun	29
b.	Dean	39 + 69
c.	Ungar	32
d.	Block	43
e.	Christian	46

f.	Evans	49
g.	Anderson	50
h.	Carpentier	58
i.	Tipton	61
j.	Farman	64
k.	Caphait	65
l.	Sada	70
m	Fletcher	75

15. Neither Jack Davis, Inc., Snow Flower, Ltd. nor I have any other contractual relationships concerning the Condominiums with any other members of the Snow Flower Homeowners Association other than those persons identified in Paragraph 14 above.

DATED this 27th day of September, 1999.

Jack Davis

On this 27th day of ~~September~~ October, 1999, Jack Davis personally appeared and acknowledged before me that he executed the foregoing Affidavit and that the statements contained therein are true.

NOTARY PUBLIC
Residing at: San Diego, CA

My Commission Expires:

Feb 26, 2002

SHANNON D F RADZUNAS
Commission # 1174655
Notary Public - California
San Diego County
My Comm. Expires Feb 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, first class, a true and correct copy of the foregoing AFFIDAVIT OF JACK DAVIS, this 19th day of October, 1999, to:

Robert F. Babcock
Brian J. Babcock
WALSTAD & BABCOCK
57 West South Temple, 8th Floor
Salt Lake City, Utah 84101

Toni B. Tibbetts

Certificate of Service

I hereby certify that on this 21st day of August, I caused a true and correct copy of the foregoing Brief of Appellant, by U.S. Mail, postage prepaid, to the following:

Ronald G. Russell
Brett Swanson
PARR WADDOUPS BROWN
GEE & LOVELESS
185 South State, Suite 1300
P.O. Box 11019
Salt Lake City, UT 84147